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No. 85-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES LAURENT, Youth Supervisor II, et al.,

Petitioners,

vs.

JEFFREY WATTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court erred in denying defendants' motion for a judgment notwithstanding the verdict because no evidence of deliberate indifference was presented in this case.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
ARGUMENT:	
DELIBERATE INDIFFERENCE TO PLAINTIFF'S NEED FOR PROTECTION WAS NOT PROVEN IN THIS CASE, SO THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT	1
CONCLUSION	4

TABLE OF AUTHORITIES

Federal Cases	PAGE
Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8 (9th Cir.), *cert. denied*, 417 U.S. 932 (1973)	2
Hurd v. American Hoist & Derrick Co., 734 F.2d 495 (10th Cir. 1984)	2
O'Neil v. W.R. Grace & Co., 410 F.2d 908 (5th Cir. 1969)	2
Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979)	3
Ries v. Sanders, 34 F.R.D. 468 (N.D. Miss. 1964)	2
Whitley v. Albers, ___ U.S. ___, 46 S. Ct. Bull. (CCH) 1256 (1986)	3

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ARGUMENT

DELIBERATE INDIFFERENCE TO PLAINTIFF'S NEED FOR PROTECTION WAS NOT PROVEN IN THIS CASE, SO THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

In his Brief in Opposition ("Br. Opp.") to the Petition for a Writ of Certiorari in this case, the plaintiff argues that defendants have "waived" (Br. Opp. at 23) the argument presented in their Petition, presumably because of their failure to request appropriate jury instructions (Br.

Opp. at 26-27). This argument completely misses the mark, since the presence of a fact question to be resolved by the jury would have been inconsistent with their request for the entry of a judgment notwithstanding the verdict ("JNOV"). Indeed, defendants' entire Petition before this Court has been predicated upon the absence of a factual issue to be resolved by the jury.

The standard for granting a JNOV is the same standard applied in granting a directed verdict. *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 13 (9th Cir.), *cert. denied*, 417 U.S. 932 (1973); *O'Neil v. W.R. Grace & Co.*, 410 F.2d 908 (5th Cir. 1969). Such a motion presents a question of law as to whether all of the evidence (together with all reasonable inferences drawn therefrom), when viewed in the light most favorable to the plaintiff, fails to prove a necessary element of the plaintiff's claim. *Ries v. Sanders*, 34 F.R.D. 468, 470 (N.D. Miss. 1964). If so, then the motion should be granted because no factual question is presented for the jury to decide. *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir. 1984).

In the instant case, the precise question to be resolved by the District Court in ruling on the defendants' motions for a directed verdict and for judgment notwithstanding the verdict was whether the evidence could have permitted a jury to conclude that defendants were deliberately indifferent to plaintiff's need for protection. Defendants maintain that no such evidence was introduced in this case. At best, plaintiff has shown that defendants were negligent, which is not sufficient to sustain a verdict under the Eighth Amendment.

As this Court has recently emphasized, "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary

negligence." *Whitley v. Albers*, ____ U.S. ____, 46 S. Ct. Bull. (CCH) 1256 (1986). Unless the evidence, viewed in the light most favorable to the plaintiff, will support an inference of deliberate, willful, or reckless conduct, "the case should not go to the jury." *Id.* at 1264. This was precisely the situation presented by the instant case where there was no evidence of willful or reckless behavior presented by the plaintiff.

The facts of the instant case contrast sharply with the facts of *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979) (Br. Opp. at 28), where the prisoner yelled for help because he was approached by three other inmates desiring sex. Plaintiff and one other inmate testified that the defendant Baxley ignored the plea for help, "basically telling the plaintiff to take care of himself." 475 F. Supp. at 1114. A few hours later the three inmates approached plaintiff again, this time forcibly raping him. *Id.* Since the defendant had knowledge of an imminent threat to plaintiff's safety, defendant's failure to take some action to protect plaintiff was actionable under the Eighth Amendment.

No similar facts were presented in the instant case, where all of the alleged threats took place several weeks prior to the injury itself, and where such hostile comments were a common, everyday occurrence among prisoners at the St. Charles facility. There was no reason for defendants to suspect that a physical assault would occur as a result of the arguments between plaintiff and Derrick in the instant case.

Accordingly, no jury question was presented concerning the defendants' deliberate indifference because there was *no* evidence of deliberate indifference. Defendants are not asking this Court, nor did they ask the District Court or the Seventh Circuit, to reweigh the evidence or re-

assess the credibility of the witnesses. Rather, defendants simply assert that no fact question was presented because plaintiff failed to present any evidence which would support a verdict on one of the necessary elements of his claim—deliberate indifference. For this reason, defendants' motion for a JNOV should have been granted.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari. Alternatively, petitioners pray that this Court summarily reverse the decision of the Seventh Circuit Court of Appeals imposing Eighth Amendment liability on these defendants, or vacate and remand this case for reconsideration in light of your recent decisions concerning the Eighth Amendment.

Respectfully submitted,

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